Nos. 09-987, 09-988, 09-991

FILED
MAR 24 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, *et al.*,
Petitioners,

ARIZONA SCHOOL CHOICE TRUST, *et al.*,
Petitioners,

GALE GARRIOTT, in his official capacity as
Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* JEWISH TUITION ORGANIZATION AND NEW WAY LEARNING ACADEMY IN SUPPORT OF PETITIONERS

BENNETT EVAN COOPER
Counsel of Record
STEPTOE & JOHNSON LLP
Collier Center
201 East Washington Street
Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5200
bcooper@steptoe.com

Attorneys for Amici Curiae

228895

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE STO TAX CREDIT PROGRAM PROVIDES ADDITIONAL LEVELS OF PRIVATE CHOICE THAT INSULATE THE TAX CREDIT FROM ESTABLISHMENT CLAUSE CONCERNS	6
A. STOs Enhance the Private Nature of Scholarship Grants	6
B. STOs Operate as Private Actors in a Competitive Marketplace for Contributors	9
C. STOs Freely Choose Whether to Adopt Limiting Principles	13
D. Scholarship Funds Flow to Religious Schools Only Because They Follow Parents' Demand	19
II. IT IS URGENT THAT THE COURT GRANT CERTIORARI NOW	24
CONCLUSION	25

TABLE OF CITED AUTHORITIES

Page

CASES

Cain v. Horne,
202 P.3d 1178 (Ariz. 2009) 21

Green v. Garriott,
212 P.3d 96 (Ariz. Ct. App.), *review denied*
(Ariz. Oct. 27, 2009) 5, 7

Kotterman v. Killian,
972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 810
(1999) ..... *passim*

Larkin v. Grendel's Den, Inc.,
459 U.S. 116 (1982) 18

Mueller v. Allen,
463 U.S. 388 (1983) 5, 6, 19

Winn v. Ariz. Christian Sch. Tuition Org.,
562 F.3d 1002, *reh'g en banc denied*, 586 F.3d
649 (9th Cir. 2009) ..... *passim*

Winn v. Ariz. Christian Sch. Tuition Org.,
586 F.3d 649 (9th Cir. 2009) ..... *passim*

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) ..... *passim*

Cited Authorities

Page

CONSTITUTIONS, STATUTES AND REGULATIONS

U.S. Const. amend. I 1, 3, 19

Ariz. Const. art. IX, § 10 21

Ariz. Rev. Stat. Ann. § 15-181 (West 2009) 20

Ariz. Rev. Stat. Ann. § 15-816.01 (West Supp. 2009) 21

Ariz. Rev. Stat. Ann. § 43-1088 (West Supp. 2009) 11

Ariz. Rev. Stat. Ann. § 43-1089 (West Supp. 2009) 1, 8

Ariz. Rev. Stat. Ann. § 43-1089.01 (West Supp. 2009) 11

Ariz. Rev. Stat. Ann. § 43-1183 (West Supp. 2009) 5-6

Ariz. Rev. Stat. Ann. § 43-1184 (West Supp. 2009) 6

Minutes of Mtg., H.R. Comm. on Educ., H.B. 2074, 43rd Leg., 1st Reg. Sess. 1 (Ariz. Jan. 29, 1997) 13

Page

OTHER AUTHORITIES

Arizona Charter Schools Association, *About Arizona Charter Schools*, http://www.azcharters.org/pages/schools-basic-statistics (last visited Mar. 15, 2010) 20

Arizona Charter Schools Association, *Start Your Charter School*, http://www.azcharters.org/CharterStarter (last visited Mar. 15, 2010) 22

Arizona Department of Education, *Charter School Search*, http://www.ade.state.az.us/charterschools/ (last visited Mar. 15, 2010) 20

Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008* (2009) 2, 3, 12, 13

Arizona Independent Schools Scholarship Foundation, http://www.aissf.org/ aboutus.php (last visited Mar. 15, 2010) 16

Cited Authorities

Page

Arizona Native Scholastic Enrichment and Resources, http://ag.arizona.edu/pubs/general/azlp47-2/other_resources.html (last visited Mar. 15, 2010) 15

Arizona Private Education Scholarship Fund, Inc., http://apesf.org/supported_schools (last visited Mar. 15, 2010) 14

Arizona Scholarship Fund, https://www.azscholarships.org/index.aspx?c=73 (last visited Mar. 15, 2010) 14

Arizona Waldorf Scholarship Foundation, http://www.tucsonwaldorf.org/Development_Tax_Credit.html (last visited Mar. 17, 2010) 16

Chandler Traditional Academy, http://www.mychandlerschools.org/200920981408243/blank/browse.asp?A=383&BMDRN=2000&BCOB=0&C=68508 (last visited Mar. 15, 2010) 21

Institute for Better Education, https://www.ibescholarships.org/index.aspx?c=80 (last visited Mar. 15, 2010) 14-15

Page

Maricopa County Schoolhouse Foundation, http://www.mcschoolhousefoundation.org/pdf/tuitionTaxCreditForm2006.pdf (last visited Mar. 15, 2010) 16

Montessori Centre School Tuition Organization, http://www.montessorictr.org/Newsletters/Main/Newsletter%20September%202009.pdf (last visited Mar. 15, 2010) 16

Montessori Scholarship Organization, http://www.mklthejungle.org/mso-tax-credits.html (last visited Mar. 15, 2010) 16

Orme-Primavera Schools Foundation, http://www.ormeprimaveraschools foundation.org (last visited Mar. 15, 2010) 17

School Tuition Association of Yuma, Inc., http://www.azstay.org (last visited Mar. 15, 2010) 15

Erica Schacter Schwartz, *Why Pay for Religious Schools When Charters Are Free?*, Wall St. J., June 12, 2009, at W13 22

Tuition Organization for Private Schools, https://www.topsforkids.com/index.aspx?c=60 (last visited Mar. 15, 2010) 15

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Jewish Tuition Organization ("JTO") and New Way Learning Academy reflect the diversity of educational opportunities for children advanced by Arizona's private school tuition organization ("STO") tax credit, Ariz. Rev. Stat. Ann. § 43-1089 (West Supp. 2009), and endangered by the Ninth Circuit panel's opinion attacking that credit under the Establishment Clause.

The JTO is a 501(c)(3) Arizona non-profit corporation formed in 1999 to support Jewish day school education in the Phoenix metropolitan area. The JTO was organized by concerned members of the Jewish community, and its board consists of directors appointed by each of the participating day schools and a chair appointed by the Jewish Federation of Greater Phoenix.[2] Measured by contributions in 2008, the last year for which the Arizona Department of Revenue has published data, the JTO is the sixth-largest STO in Arizona. In

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the clerk, and counsel of record gave each party's attorney at least ten days' notice of the intent to file this brief.

[2] The JTO's participating schools currently include the East Valley Jewish Day School, the Jess Schwartz Jewish Community Day School, Pardes Jewish Day School, the Phoenix Hebrew Academy, Shalom Montessori, and Shearim Torah High School.

2008 it made need-based scholarship grants of nearly $2.2 million to approximately 390 students. The JTO's average grant in 2008 was $5,585, among the highest in the state.[3]

While some contributors to the JTO do not take the STO tax credit, most of the contributions are made by individuals who intend to take advantage of it, and the JTO solicits contributions on the basis of the tax credit. Without the JTO's tax credit-financed scholarships, hundreds of children each year would be unable to afford to continue in their schools.

New Way Learning Academy is Arizona's only non-profit, private K-12 school specializing in educating children with learning differences, including dyslexia, AD/HD, and other issues. Founded in 1968, the Scottsdale school, which has no religious affiliation, is approved by the Arizona Department of Special Education to serve students with learning disabilities, and its faculty includes certified special education teachers and reading specialists, a speech-language pathologist, an occupational therapist, and certified academic language therapists. New Way offers a student/staff ratio of 6:1 and develops individualized education plans carefully crafted around the student's educational needs and abilities as identified through

[3] *See* Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, apps. 1-11 (2009) [hereinafter *ADOR 2008 Reporting*], *available at* http://www.azdor.gov/Portals/0/Reports/private school-tax-credit report-2008.pdf (last visited Mar. 15, 2010).

comprehensive assessments of speech/language skills, motor skills, and more.

New Way participates in New Valley Education Partners, an STO that grants scholarships to students who attend three non-religious Arizona schools: New Way, Tesseract School, and Verde Valley School. The cost of such specialized education is significant, and in 2008 twenty New Way students received need-based scholarships totaling over $204,000. *ADOR 2008 Reporting*, *supra* note 3, app. IV. The STO tax credit is crucial to New Way's ability to continue to provide unique educational opportunities for its students.

SUMMARY OF ARGUMENT

The Ninth Circuit panel's opinion misapplies this Court's precedent in reinstating Respondents' Establishment Clause challenge to Arizona's thirteen-year-old STO tax credit. Contrary to the panel's opinion, Arizona STOs *enhance* the constitutionality of the tax credit by adding three more layers of *private* choice on top of the parents' own decision about where to educate their children. First, private citizens—including parents—create the STOs. Second, the private STOs then decide whether to provide scholarships at all private schools in Arizona or a subset of such schools. In doing so, many STOs adopt a wide variety of limiting principles for schools or scholarships: geography, special needs, culture, extreme financial need, pedagogical philosophy, shared non-sectarian school characteristics, self-selected school groupings, and, lastly, religious instruction. If existing STOs do not adequately serve the interests of particular groups of parents or schools,

then those groups can and do create new STOs to meet their needs.

Third, each STO must convince each taxpayer each year not only to take advantage of the tax credit, but also to contribute to that particular STO. Taxpayers considering whether to make a contribution face the burden of the float between the contribution in one year and the tax credit in the next. That float may be a high or even insuperable barrier to participation at any level, and the tax credit therefore operates in practice much like a tax deduction. The limiting principles on which some STOs operate, whether non-sectarian or sectarian, are critical to their efforts to persuade taxpayers that the causes and interests they represent—the students and schools they aid—are worthy of support.

This market of families, schools, taxpayers, and STOs consists entirely of private actors exercising private choices. When it comes to whether the children and the scholarship dollars will end up at religious or non-religious schools, the state is entirely neutral. Arizona has sought to enhance the quality of education by promoting competition among public and private schools of *all* kinds, not to establish religion.

The Court should grant certiorari at this time, rather than allowing further delay as this case, which is already ten years old, winds its way through the district court and court of appeals a third time, leaving thousands of children at immediate risk. Despite the technically interim procedural posture of the Ninth Circuit's decision, the facts concerning where the scholarship funds ultimately go are not in dispute, and there is no

additional evidence of legislative intent to be gleaned. The court of appeals' remand to the district court will be an empty exercise, and the doctrine of law of the case will likely control any future appeal from final judgment. Thus, the case will find its way back to this Court unchanged. In the meantime, the panel's opinion will cast a pall on STOs' ability to solicit contributions needed to fund scholarships for tens of thousands of elementary- and secondary-school students in Arizona private schools. This threat to the continuity of the education of children whose families have relied on STO-funded grants for as long as a decade, as well as to the viability of many private schools, makes the issues presented of urgent and compelling public importance.

ARGUMENT

Petitioners have explained in their respective petitions how the panel's opinion conflicts with this Court's decisions in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), as well as Arizona state court decisions upholding both the individual STO tax credit at issue here, *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 810, 921 (1999), and Arizona's more recently enacted corporate STO tax credit, *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App.), *review denied* (Ariz. Oct. 27, 2009).[4] Instead of repeating that analysis, the JTO

[4] In 2006 the Arizona legislature enacted a tax credit for corporate contributions to STOs that fund scholarships for students whose family income does not exceed 185 percent of the income limit for federal reduced-price lunch programs, and who transfer from public to private school. Ariz. Rev. Stat. Ann. (Cont'd)

and New Way address how the Ninth Circuit panel's opinion misapprehends the tax credit's operation, finding a perceived government imprimatur on religious education in a scholarship system that operates completely as a matter of multi-tiered *private* choice in a competitive market of parents, contributors, private schools, and privately formed and operated STOs.

I. THE STO TAX CREDIT PROGRAM PROVIDES ADDITIONAL LEVELS OF PRIVATE CHOICE THAT INSULATE THE TAX CREDIT FROM ESTABLISHMENT CLAUSE CONCERNS.

A. STOs Enhance the Private Nature of Scholarship Grants.

The Ninth Circuit panel misplaced reliance on Respondents' allegation that most STO funds are available only for education at religious schools, thereby restricting parents' choice. This, the panel speculated, "could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1012 (9th Cir. 2009) [hereinafter Panel Opinion]. Based on the range of parental choice alone, the panel compared the tax credit's operation unfavorably to the educational-expense deduction and direct voucher program at issue in *Mueller* and *Zelman*. *See id.* at 1015-16 & n.13; *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 656

(Cont'd)

§ 43-1183(K) (West Supp. 2009). In addition to this credit, which was upheld in *Green*, in 2009 the Arizona legislature created a separate corporate tax credit for contributions to STOs that fund scholarships for children with disabilities or in foster care. Ariz. Rev. Stat. Ann. § 43-1184(Q)(3) (West Supp. 2009).

(9th Cir. 2009) (D.W. Nelson, Reinhardt, Fisher, JJ., concurring in denial of rehearing en banc) [hereinafter Panel Concurrence]. But in those cases, parental choice was particularly significant because it was the *only* operative avenue of private choice that channeled the government benefits.

In contrast, Arizona has further insulated educational choices from government involvement by structuring a program with multiple levels of private actors. In upholding the corporate STO tax credit, the Arizona Court of Appeals recognized that "[t]here are two distinct levels of private choice that 'direct the aid to religious schools or institutions of their choosing,': "the taxpayer" and "the scholarship recipient and his or her parents." *Green*, 212 P.3d at 102 (quoting *Zelman*, 536 U.S. at 649). In fact, there is also a third level of private choice: the STOs themselves.[5]

The creation and operation of the STOs reflect and interact with the choices of parents, schools, and contributors, who collectively express through a competitive marketplace what types of STOs exist and which schools they may from time to time support by making grants to matriculating students. The government is not involved at all in deciding which students will receive grants, much less which schools

[5] "Multiple layers of private, individual choice separate the state from any religious entanglement," and the government "is at least four times removed from any aid to religious organizations": "Individuals choose to create an STO. STOs choose to limit their funds to certain schools. Taxpayers choose to donate. Parents choose to apply for scholarships." 586 F.3d 658, 662, 670 (O'Scannlain, J., joined by Kozinski, C.J., Kleinfield, Gould, Tallman, Bybee, Bea, and N.R. Smith, JJ., dissenting from denial of rehearing en banc) [hereinafter En Banc Dissent].

they will attend. The government never even receives individualized reporting of grants, but only aggregate data for the STOs and schools. *See* Ariz. Rev. Stat. Ann. § 43-1089(F)(1)-(6) (West Supp. 2009).

Each of these tiers of private actors has equal constitutional significance in distancing the government from any perception of impermissible involvement in religious education, even if the different private actors may at times be perceived to act at cross-purposes by restricting one another's choices. As this Court noted in *Zelman*, "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." 536 U.S. at 654-55. The Court did not suggest, as the panel asserted, that the "private individuals" who make the "private choice" must be parents. *Cf.* Panel Opinion, 562 F.3d at 1016, 1017 n.14. Consequently, if the vouchers to parents at issue in *Zelman* were constitutional because one level of private actors (parents) determined that the money would end up largely at religious schools, then *a fortiori* the same must be true of a system that involves multiple levels of private actors (parents, taxpayers, and STOs) who collectively make that determination. As eight Ninth Circuit judges poignantly asked below in dissenting from the denial of rehearing en banc, "How can *increasing* the separation between state and religion result in heightened government endorsement?" En Banc Dissent, 586 F.3d at 662.

The panel attempted to blur the distinction between these private actors and the state by using passive terminology[6] or by attributing the result to "how the Arizona Department of Revenue applies the statute." Panel Concurrence, 586 F.3d at 650, 651. But the state has "applied the statute" by maximizing private choice in the marketplace of educational ideas. To the extent that there are "incentives for parents to send their children to religious schools," *id.* at 653, they are not of the state's making.

B. STOs Operate as Private Actors in a Competitive Marketplace for Contributors.

In law and in practice, the government does not fund STOs; private contributors do. The government does not make grants or disburse public money to STOs; it does not select the winners or losers. *See Kotterman*, 972 P.2d at 618 (holding that "no money *ever* enters the state's control as a result of this tax credit" and, "under any common understanding of the words, we are not here dealing with 'public money'"). Rather, the state's tax credit allows contributors to keep more of their own money, regardless of the means by which the tax consequences are calculated. As the Arizona Supreme Court noted, "It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the

---

[6] *E.g.*, Panel Concurrence, 586 F.3d at 650 ("Under the Arizona program . . ."); *id.* at 653 ("by allowing tax credits for contributions to discriminatory STOs"); *id.* at 658 (similar).

government, and upon which the state has a legal claim." *Id.*

The Ninth Circuit panel's fundamental mistake lay in viewing the STO tax credit as the functional equivalent of direct grants by the state to religious schools or even religiously oriented STOs, as if they, rather than the taxpayers, received the tax credit. *See* Panel Opinion, 562 F.3d at 1009-10. Its analysis hinged on drawing a hard-and-fast line between above-the-line tax deductions and below-the-line tax credits. *See id.* at 1008-10. In reality, with respect to both timing and government involvement in the disbursement of scholarship funds, the STO tax credit functions in the same manner, and subject to the same private market forces, as a tax deduction. *See Kotterman*, 972 P.2d at 612 (concluding that despite "mechanical differences," the distinctions between deductions and credits are not "constitutionally significant").

As with a tax-deductible contribution, those who wish to take advantage of the tax credit pay their money directly to the STO of their choice. To claim the credit, taxpayers must make their contributions by December 31. Only when they later file their tax returns—i.e., by April 15 or thereafter under an extension—may the taxpayers seek a credit by submitting Arizona Form 323. The state does not provide a check-off box for contributions on the tax return, allowing taxpayers to send their taxes to enumerated STOs rather than to the government. Instead, even if the taxpayers ultimately receive a full credit, they will have incurred

the cost of the months of float between when they make their contribution in the tax year and when they either pay reduced taxes with their return or, even later, receive a refund in the following year. The only ultimate difference between this credit and a deduction is the share of the actual contribution the taxpayer ultimately sees returned in lower taxes.

In light of, among other things, taxpayers' inertia, their philosophical preference for public school education, and the cost of the months of float between contribution and credit, STOs have to market the tax credit to convince taxpayers to exercise their private choice. This includes explaining how the tax credit operates and convincing taxpayers that private schools merit support. Moreover, in the same year that Arizona adopted the STO tax credit, it also adopted tax credits for contributions to public school extracurricular activities and character education programs, Ariz. Rev. Stat. Ann. § 43-1089.01 (West Supp. 2009), and to charitable organizations that help the working poor, Ariz. Rev. Stat. Ann. § 43-1088 (West Supp. 2009). While taxpayers may take each of these tax credits, financial constraints often put the STOs, public schools, and other organizations in effective competition for contributors, particularly as the calendar year comes to a close.

For these reasons, STOs commonly rely on a variety of marketing tools, including personal solicitations by volunteers or paid marketers; public speeches; tables at events; newspaper, magazine, theater-screen, and broadcast advertising; telephone banks; and pamphlets, fliers, mass mailings, and e-mail blasts. As with any system that relies on private choice, marketing is not

an easy task. It is particularly difficult in times of economic trouble, when the float proves for many or even most taxpayers to be an insuperable obstacle to contribution, even though the taxpayer's state income tax liability exceeds the maximum contribution and the taxpayer will eventually receive a dollar-for-dollar tax credit.[7] For this reason, the JTO saw its total contributions drop for the first time in 2008, and many other STOs experienced a similar economy-driven decline in revenues. *See ADOR 2008 Reporting*, *supra* note 3, app. I.

In addition to convincing taxpayers that private school education is a worthy cause in the abstract, each STO must convince contributors that it among all other STOs deserves support. Like all private choices, support for a particular STO and its professed mission can be fickle. Taxpayers frequently change from year to year whether they contribute to any STO, as well as which STO or STOs they will support. For example, approximately one fifth of the JTO's contributor pool turns over every year. Many taxpayers may split their contributions between different STOs in a single year, based on how the taxpayer values the choices made by the STO. "[N]othing in Section 1089 precludes any Arizona taxpayer, tomorrow, from suddenly deciding to fund exclusively secular STOs." En Banc Dissent, 586 F.3d at 664 n.12. In this ongoing struggle for taxpayer support, the state simply plays no role.

---

[7] Thus, as a practical matter the panel erred in suggesting that "[a] tax-credit eligible contribution to an STO costs the taxpayer nothing." Panel Concurrence, 586 F.3d at 650 n.2.

C. STOs Freely Choose Whether to Adopt Limiting Principles.

The STO tax credit in operation fulfills the secular purpose of "equalizing opportunities for Arizona's children" by, as its primary legislative sponsor explained, providing "an encouragement and incentive for citizens to donate to an organization they believe in."[8] Because citizens believe in different things, STOs do not come in one flavor, and the variety of STOs is not the result of government preference, but the fruit of private choice cross-pollinated among families, schools, and communities. STOs are created from time to time by private actors, free of government influence, to further the beliefs, priorities, and interests of a variety of other private actors, including parents, schools, and taxpayers themselves. Indeed, STOs have dramatically expanded in number: In 1999, the year before this litigation began, there were seventeen STOs in operation; in 2000 there were thirty; and today there are fifty-five. *ADOR 2008 Reporting*, *supra* note 3, at 3. As the dissent below accurately noted, "Anyone can form an STO, and there are no constraints on a taxpayer's ability to donate to an STO of his choice." En Banc Dissent, 586 F.3d at 659. In particular, parents "can create their own STO and solicit donations for use at secular private schools." *Id.* at 666. The formation of both the JTO and New Valley Education Partners illustrates these points.

---

[8] Minutes of Mtg., H.R. Comm. on Educ., H.B. 2074, 43rd Leg., 1st Reg. Sess. 1 (Ariz. Jan. 29, 1997) (statement of Rep. Mark Anderson), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1R/comm_min/House/0129%2EED.htm (last visit-ed Mar. 18, 2010).

To the extent that some (but not all) STOs may limit the qualifying schools at which their scholarships may be used, that is in part because many STOs are created by the schools themselves for the benefit of the families who wish to send their children there. As a result, the diversity and size of STOs reflect the diversity and size of the school communities they support. The JTO, for example, was born in discussions among representatives of three Jewish schools about the need for a common fund that would avoid competition for contributors, and the idea was later supported by a broader community organization, the Jewish Federation of Greater Phoenix. In contrast, New Valley Education Partners, in which New Way participates, reflects the cooperation of three diverse non-religious schools that do not share common signature characteristics other than a commitment to quality education.

It is up to the STO itself how to define the students and schools it will directly or indirectly support. Some STOs support *all* children and *all* schools. Other STOs distinguish among children based only on whether the families demonstrate the level of financial need that the STO requires. (Petitioner Arizona School Choice Trust is of the latter type.) Many STOs thus support a broad range of schools that includes religious and non-religious institutions.[9]

---

[9] Such STOs also include the Arizona Scholarship Fund (Arizona's third largest STO), https://www.azscholarships.org/index.aspx?c=73 (last visited Mar. 15, 2010); the Arizona Private Education Scholarship Fund, Inc., http://apesf.org/supported_schools (last visited Mar. 15, 2010); the Institute for Better Education, https://www.ibescholarships.org/index.aspx?c=80

(Cont'd)

In contrast, other STOs have chosen one or more distinctive limiting principles that may be religious or non-religious in nature. These limiting principles reflect private choices about what kinds of children to help, or what kind of schools or education to foster:

- **Geography:** An STO may focus geographically, soliciting contributors and supporting private schools in a particular area.[10]

- **Special Needs:** As in New Way's case, an STO, reflecting a school it supports, may focus on grants to children with special educational needs.

- **Culture:** An STO may focus on aiding students on a cultural basis rather than religious grounds.[11]

(Cont'd)
(last visited Mar. 15, 2010); and the Tuition Organization for Private Schools, https://www.topsforkids. com/index.aspx?c=60 (last visited Mar. 15, 2010).

[10] One example is the School Tuition Association of Yuma, Inc. *See* http://www.azstay.org (last visited Mar. 15, 2010).

[11] For example, Arizona Native Scholastic Enrichment and Resources provides for the educational needs of Arizona Native American youth and their tribes, and its "strategy is to prepare American Indian students for success in college by placing them in private high schools." http://ag.arizona.edu/pubs/general/azlp47 2/other_resources.html (last visited Mar. 15, 2010).

- **Extreme Need:** An STO may focus on families in the direst financial straits, such as the homeless.[12]

- **Pedagogy:** An STO may support schools that use a particular non-religious pedagogical approach, such as the Montessori method or Waldorf education.[13]

- **Shared School Characteristics:** An STO may support groups of schools based on shared non-religious characteristics, such as membership in a national school organization.[14]

---

[12] The Maricopa County Schoolhouse Foundation provides scholarships for the children of homeless parents and other economically disadvantaged families. *See* http://www.mcschoolhousefoundation.org/pdf/tuitionTaxCreditForm2006.pdf (last visited Mar. 15, 2010).

[13] Examples include the Montessori Centre School Tuition Organization, http://www.montessorictr.org/Newsletters/Main/Newsletter%20September%202009.pdf (last visited Mar. 15, 2010); the Montessori Scholarship Organization, http://www.mklthejungle.org/mso-tax-credits.html (last visited Mar. 15, 2010); and the Arizona Waldorf Scholarship Foundation, http://www.tucsonwaldorf.org/Development_Tax_Credit.html (last visited Mar. 17, 2010).

[14] For example, the Arizona Independent Schools Scholarship Foundation supports need based scholarships to three non-religious Arizona schools that are members of the National Association of Independent Schools: Phoenix Country Day School, Green Fields Country Day School, and St. Gregory College Preparatory School. *See* http://www.aissf.org/aboutus.php (last visited Mar. 15, 2010).

- **School Groupings:** An STO may reflect the coordinated efforts of the self-selected group of schools that created it.[15]

- **Religious Instruction:** Finally, an STO may support schools that offer religious education, whether they reflect a particular movement or denomination or a broad range of beliefs.

The JTO, for example, chooses to support scholarships at Jewish day schools for families with financial need, and its staff and volunteer accountants work diligently to evaluate the financial need of applicants and make scholarship grants. Over more than a decade of operation, it has added additional or new participating day schools in response to parent or community requests.

In any event, as the dissent below observed, the majority of STOs—thirty out of fifty-five—do not limit their scholarships to students willing to attend religious schools. En Banc Dissent, 586 F.3d at 660 & n.6. Indeed, five of the ten largest STOs, including the third and fourth largest, have no religious affiliation. ADOR 2008 Reporting, *supra* note 3, app. I.

These limiting principles help motivate private parties to contribute to the STOs. In light of the

---

[15] For example, the Orme-Primavera Schools Foundation provides scholarships to the Primavera School in Prescott and the Orme School in Mayer, both non-religious schools. *See* http://www.ormeprimavera schoolsfoundation.org (last visited Mar. 15, 2010).

inconvenience or hardship of the float, many or even most taxpayers may not be sufficiently moved by the idea of private-school education generally to support an all-children, all-schools approach. They are generally more inclined to give to STOs if they know their money will help children with particular financial or educational needs, or local schools, or their children's or friends' schools, or their own alma mater, or particular educational methods, or religious teaching.

But in every respect and at every level, those are purely private choices, not government policy. The government does not encourage STOs to adopt *any* limiting principles, much less religious ones, and it does not encourage taxpayers to contribute to a particular kind of STO. In making their philosophical and educational judgments, STOs operate in the same manner as private scholarship organizations that are funded solely by tax-deductible charitable contributions. They certainly exercise no governmental authority that could be analogized, as the panel did, to the state's delegation of the authority to veto liquor license applications in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). *See* Panel Opinion, 562 F.3d at 1020-21.

No reasonable observer would perceive any government favoritism toward a particular choice. As with tax-deductible contributions, the State of Arizona provides the playing field and makes neutral rules, but it then sits on the sidelines and does not root for any team. There is no sense in which, "from the perspective of the program's aid recipients, [the tax credit] 'deliberately skew[s] incentives toward religious schools.'" Panel Opinion, 562 F.3d at 1013 (quoting

Zelman, 536 U.S. at 650). The dissent below thus accurately noted that "the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel." En Banc Dissent, 586 F.3d at 660. "That is not government endorsement: that is government nonchalance." *Id.* at 662.

D. Scholarship Funds Flow to Religious Schools Only Because They Follow Parents' Demand.

The Ninth Circuit panel's reliance on how the scholarships ultimately are awarded from year to year is both legally erroneous and factually misguided. As a legal matter, this Court has at least twice rejected rules that would evaluate facially neutral laws under the Establishment Clause based on who benefits from time to time, which is necessarily a moving target. *See Zelman*, 536 U.S. at 657 ("attribut[ing] constitutional significance" to a high percentage of participating religious schools "would lead to the absurd result that a neutral school-choice program might be permissible" in some areas or states but not others); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

As a factual matter, money tends to end up in private religious schools because they outnumber private non-religious schools. That is hardly surprising, because the State of Arizona has dramatically enhanced the variety of non-religious options available in *public*

schools. *See Zelman*, 536 U.S. at 655-56 (holding that Establishment Clause question "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school").

For example, in 1994—three years before the STO tax credit was enacted—the Arizona legislature authorized charter schools to "provide additional academic choices for parents and pupils" and "serve as alternatives to traditional public schools." Ariz. Rev. Stat. Ann. § 15-181(A) (West 2009). Such public schools operate independently of the local school district and reflect a variety of educational philosophies.[16] There are charter schools that focus on "great books" (the Great Hearts Academies), other educational methods (the Montessori Charter School of Flagstaff), the arts (the Arizona School for the Arts), the sciences (the Academy of Math and Science), and a variety of other needs and target communities. Of the more than 4,000 charter schools in the United States, 502 are in Arizona; they represent a quarter of all public schools in the state, and enroll over 101,000 students—ten percent of Arizona's public school population.[17]

In addition, in 1995 the Arizona legislature mandated an "open enrollment policy" in public schools

---

[16] *See* Arizona Department of Education, *Charter School Search*, http://www.ade.state.az.us/charterschools/ (last visited Mar. 15, 2010) (list of charter schools).

[17] *See* Arizona Charter Schools Association, *About Arizona Charter Schools*, http://www.azcharters.org/pages/schools-basic-statistics (last visited Mar. 15, 2010).

in order to expand parental choice. *See* Ariz. Rev. Stat. Ann. § 15-816.01(A) (West Supp. 2009). As an example of the choices now available, some public school districts themselves offer "traditional academies" that use different curricula and instructional methods.[18]

This range of options is critical in at least two ways. First, there is no evidence for the panel's suggestion that the Arizona legislature attempted through the STO tax credit to advance religion. *See, e.g.*, Panel Concurrence, 586 F.3d at 657-58. Rather, Arizona has sought to advance the secular goal of improving the quality of education by expanding educational options of *all* kinds. It has promoted competition among public schools (whether district or charter), among private schools, and between public and private schools. The Arizona Constitution's Aid Clause, however, prohibits direct government aid to *any* private schools, whether or not religious. *See* Ariz. Const. art. IX, § 10; *Cain v. Horne*, 202 P.3d 1178, 1182-84 (Ariz. 2009) (invalidating voucher program because "[t]he Aid Clause prohibits the use of public funds . . . to aid *private* or sectarian schools"). The Arizona Supreme Court held in *Kotterman* that the Aid Clause did not prohibit tax credits for private contributions. 972 P.2d at 617-21. The tax credit program therefore was necessary to support private educational options of any and all kinds, and Arizona has now enacted several credits for that purpose. *See supra* note 4.

---

[18] *See, e.g.*, Chandler Traditional Academy, http://www.mychandlerschools.org/200920981408243/blank/browse.asp?A=383&BMDRN=2000&BCOB=0&C=68508 (last visited Mar. 15, 2010).

Second, given the opportunities to attend innovative publicly funded district or charter schools on a tuition-free basis, or even to start a charter school rather than a private school,[19] it is to be expected that most students or educational innovators interested in non-religious education will end up in public schools. *See* Erica Schacter Schwartz, *Why Pay for Religious Schools When Charters Are Free?*, Wall St. J., June 12, 2009, at W13 ("This mix of charter and after-school tutorial is the model that presents a real challenge to private, religiously focused day schools.").

It is also to be expected that private schools will tend to be those that offer what public schools cannot. In some cases, private schools may provide non-religious education of a specialized kind; *amicus* New Way, for example, focuses on serving students with learning differences. In other cases, private schools may provide religious education. *See Zelman*, 536 U.S. at 656-57 ("Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities."). Thus, roughly three-quarters of Arizona's private schools are religious[20] and, consistent with that fact, Respondents alleged below that "75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the

---

[19] *See* Arizona Charter Schools Association, *Start Your Charter School*, http://www.azcharters.org/CharterStarter (last visited Mar. 15, 2010).

[20] *See Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) ("At least seventy-two percent of [Arizona nongovernmental] schools are sectarian.").

schools receiving scholarships were religious schools." 9th Cir. Excerpts of Record 4. STO funds have thus followed the students and the schools as a matter of private choice, not government policy. The results of private choices do not provide grounds for invalidating the tax credit under the Establishment Clause.

The panel argued that "taxpayers, rather than parents, direct funds to religious organizations" and thereby limit parents' choices to send their children to non-sectarian schools, Panel Concurrence, 586 F.3d at 650, 652, but this assertion fails to appreciate the role of parents in determining which STOs receive money in the first place. Parents are critical to starting many STOs, convincing STOs to add schools to approved lists, and directing contributions to STOs that support the schools of their choice. They do this not only by contributing themselves to STOs, but also by convincing family members, friends, neighbors, and co-workers to contribute. They also man the STOs' marketing efforts: working tables at events, passing out fliers, staffing phone banks.

In the end, many STOs give all or sizeable portions of their scholarship funds to students at religious schools because the families *prefer* to send their children to those schools, and help direct taxpayer contributions to STOs that can fund those preferences. Parents are not the passive victims of others' choices—much less the choices of any state actors—but rather are the engine of choice by the students, the schools, the STOs, and the taxpayers.

II. IT IS URGENT THAT THE COURT GRANT CERTIORARI NOW.

This Court should grant certiorari and review the Ninth Circuit panel's opinion at this juncture, as any delay will put at risk the education of thousands of children throughout Arizona. For over a decade, parents and schools have relied on tax credit-funded scholarships awarded by STOs, and over 28,000 students currently receive scholarships. They have done so with the security of knowing that the STO tax credits have been consistently upheld by Arizona and federal courts since the *Kotterman* decision in 1999. Many of the children have attended their current schools for their entire academic lives, and they have no effective alternatives for staying in those schools. Most STOs rely almost exclusively on contributions by taxpayers who anticipate taking the tax credit. Without the tax credit, many schools will wither and some will die, and even if the schools survive many children will be unable to afford them.

Though the Ninth Circuit panel's decision is by nature interim, it casts a pall over the tax credit and the scholarships it funds. Many taxpayers already accept the burden of the float, and they will be asked also to accept an unwarranted risk that the panel's opinion will retroactively impose higher tax liabilities (unless the STOs agree to return contributions that likely have already been paid out in grants). Unless this Court grants certiorari now, the natural result of the Ninth Circuit panel's opinion will be to depress the level of contributions this year and for years after, even if the tax credit is ultimately upheld.

Moreover, as the dissent noted, despite "the procedural posture of this decision" and the remand to the district court, "no one disputes plaintiffs' factual allegations about how the program operates in practice," and the remand will be "little more than an empty formality." En Banc Dissent, 586 F.3d at 661 n.7. A future Ninth Circuit panel likely will consider itself bound by the law of the case, leaving only this Court to correct the current panel's error on a new set of petitions for certiorari, with nothing changed. To avoid this, the Court should review these issues now.

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

BENNETT EVAN COOPER
Counsel of Record
STEPTOE & JOHNSON LLP
Collier Center
201 East Washington Street
Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5200
bcooper@steptoe.com

Attorneys for Amici Curiae